Supreme Court, U.S.
FILED
95-43 JUL 6 - 1995
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BENNETT ENTERPRISES, INC.,
Petitioner,

v.

DOMINO'S PIZZA, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. MCMANUS
Counsel of Record
VERNON W. JOHNSON, III
JONATHAN R. CLARK
JACKSON & CAMPBELL, P.C.
1120 Twentieth Street, N.W.
South Tower
Washington, D.C. 20036
Counsel for Petitioners
Bennett Enterprises, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

In this breach of contract and tortious interference action, a District of Columbia jury returned a verdict in favor of the Petitioner on both counts of its Complaint, awarding compensatory and punitive damages. The trial court entered judgment in favor of Petitioner and denied Respondent's post-trial motions for relief. The Court of Appeals reversed, holding that the evidence was insufficient to support the verdict. The following questions are presented in this petition:

(1) Whether the Court of Appeals' reversal of a judgment based on a jury's verdict and a trial court's denial of Respondent's motion for judgment as a matter of law violates Petitioner's constitutionally protected due process rights, where the Respondent failed to preserve its appellate grounds at the close of all evidence as required by Fed. R. Civ. P. 50(a)(2). Uniform application of the requirements of Rule 50 to the appellate process is an important question of federal law which should be settled by this Court.

(2) Whether the Court of Appeals' reversal of a judgment based on a jury's verdict, on the grounds of insufficiency of the evidence, deprives the Petitioner of its constitutionally protected due process rights, where the Court of Appeals failed to adhere to the proper standard of review for jury verdicts. The Court of Appeals' departure from the accepted and usual course of judicial proceedings is so egregious as to call for an exercise of this Court's power of supervision.

(3) Whether the Court of Appeals' departure from the standard of review it claims to be employing can be so egregious and significant, standing alone or in conjunction with question number one above, such that it deprives the Petitioner of its constitutionally guaranteed right to a trial by jury. The Court of Appeals' reversal of the judgment and jury verdict, based on its qualitative inter-

pretation of the evidence on issues not preserved for appeal, constitutes a double violation of Petitioner's due process rights resulting in a deprivation of its right to have its case determined by a jury.

PARTIES AND RULE 29.1 STATEMENT

All of the parties who participated below are set out in the caption.

Petitioner Bennett Enterprises, Inc. states that it has no parent companies or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Bennett Enterprises, Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 45 F.3d 493. (App. 1a). The opinion of the United States District Court for the District of Columbia is unreported and is set forth in the Appendix. (App. 13a).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit rendered its decision February 3, 1995. On April 7, 1995, a timely petition for rehearing and a suggestion for rehearing *en banc* was denied. (App. 24a-25a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides, in pertinent part: "[n]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part, "[n]or shall any state deprive any person of life, liberty, or property, without due process of law."

Fed. R. Civ. P. 50(a) states, in pertinent part:

> (a) Judgment as a Matter of Law
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine

the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or be defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

STATEMENT OF THE CASE

A. The Proceedings Below.

Petitioner Bennett Enterprises, Inc. ("Bennett"), a franchisee, sued respondent Domino's Pizza, Inc. ("DPI"), its franchisor, for breach of contract for DPI's wrongful placement of Bennett in default of its Standard Franchise Agreement ("Agreement"), and because DPI failed to provide contractually obligated assistance that would have prevented the default situation from occurring. DPI placed Bennett in default in December 1988 for failure to pay taxes during the first months of its operations, declared that default cured in February 1989, then again placed Bennett in default in April of 1989 for the nonpayment of the very same taxes. At the time of the April 1989 default, Bennett was in compliance with the tax laws. No tax proceedings were ever filed against Bennett, and it had already worked out a repayment agreement with the District of Columbia, and was working towards the same with the IRS.

Bennett also sued DPI for tortious interference with prospective economic opportunity. DPI forced Bennett to sell its franchise store, and during the sales process DPI wrongfully interfered, decreasing the sales price significantly.

Jurisdiction of the trial court was pursuant to 28 U.S.C. § 1332, Bennett being a citizen of the District of Columbia and DPI being a citizen of Michigan.

A jury trial was held in June 1993. At the close of Bennett's evidence, DPI moved for judgment as a matter of law, stating the following as its sole grounds:

> I believe the language of paragraph 15.2 is unambiguous. It says, "operate a store in full compliance with all applicable laws, ordinances, regulations." Both Bruce and Arthur Bennett admit that they had an obligation to pay taxes to the various taxing authorities. Bruce Bennett specifically admitted that the tax laws were applicable to his business. . . .
>
> On Count 2, I don't believe plaintiffs have put on any evidence of any interference in the sale of the franchise to Mr. Duignan. There is no direct evidence in the record that Domino's interfered. All we have is circumstantial evidence that because they say Pat Harriday gave them a value of $400,000 for the store that thereafter Mr. Duignan withdrew his $900,000 offer, that somehow the jury should infer some sort of interference there.
>
> Fred [sic] Meeks made one and only one offer for the store. That was $500,000. He never budged from that offer. So even if they can prove interference, they cannot show damage with respect to Mr. Meeks because there was never an offer higher that he would have made were it not for the information that he received from Domino's Pizza.
>
> With respect to Mr. Duignan, the only evidence is that he withdrew the offer because he could not get financing. Plaintiff has proved nothing to the contrary. . . .
>
> Your Honor, if I may add one additional point, I don't believe the plaintiff has proved that they had a valid expectancy of receiving more than $600,000 for the value of the store. Their own expert conceded that the royalty sales were approximately 1.2 million for the prior 12 months. If you apply the 1.2 million in royalty sales to the successful store formula, it comes out to $600,000, exactly what they got for the price of the store. Whether Pat Harriday

> told them they could get 1.2 million for the store is irrelevant because that's not what the formula is. (App. 26a)

This motion was denied.

Domino's did not make a motion for judgment as a matter of law immediately following the close of *all* evidence. (See App. 35a-36a.) Instead, after going over the jury instructions with the Court following Bennett's rebuttal case, Domino's counsel had the following exchange with the Court:

> MR. SEIDLER: I am to take it when we were out there before you denied our motion for a directed verdict at the close of all evidence on both counts?
>
> THE COURT: I didn't deny any motion for a directed verdict ever in this case.
>
> MR. SEIDLER: I'm sorry, Judgment as a matter of law at the close of the evidence.
>
> THE COURT: Yes, I did.
>
> MR. SEIDLER: Okay. Are we going to address the punitive damages?
>
> THE COURT: You already have.
>
> MR. SEIDLER: You preserved.[1]
>
> THE COURT: That's correct. We'll submit the issue to the jury, and after the jury returns its verdict, you will have time to make post-verdict motions. I assume I'll give you a reasonable time like 48 hours. (App. 28a).

Nothing else was said concerning a motion for judgment as a matter of law. Domino's thus failed to specify the judgment sought and the *law* and *facts* upon which it relied, as required by Fed. R. Civ. P. 50(a)(2).

The jury awarded Bennett damages in the amount of $850,000 for DPI's breach of the franchise agreement, $450,000 for DPI's tortious interference with prospective economic opportunity, and punitive damages of $950,000. (App. 14a).

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[1] The trial court had no authority to suggest that Domino's could overlook the requirements of Rule 50(a)(2) for *appellate* purposes. Ignoring the rule was done at Domino's risk and peril.

Two weeks after trial, DPI filed a motion for judgment as a matter of law under Fed. R. Civ. P. 50, presumably subpart (b). (App. 45a). This motion was also denied by the district court.

DPI then appealed the district court's denial of its motion for judgment as a matter of law on grounds not raised in its original Fed. R. Civ. P. 50(a)(2) motion. Although irrelevant to these proceedings (because DPI's failure to follow the requirements of Rule 50(a)(2) at the close of all evidence is fatal to its proceeding further), DPI's grounds for its post-trial motion were substantially different from those articulated at the close of Bennett's case in chief.

It was Bennett's claim that DPI was not permitted to place Bennett in default for the reasons relied on by DPI, that DPI had declared any purported fault cured, that at the time of the final default Bennett was in full compliance, and that DPI's failure to provide promised assistance caused the default situation in the first place. Yet for the breach of contract claim DPI's only stated pre-verdict grounds for a Rule 50 motion was that the contract was unambiguous. Its post-judgment ground, however, was the jury's purported inability to reasonably conclude, based on the evidence, that DPI had breached the contract or failed to provide the requisite assistance. DPI's statement of issues on appeal to the circuit court expanded its grounds even further, and it was these grounds that formed the basis for the circuit court's reversal of the district court's judgment and the jury verdict. The same scenario exists for the tortious interference claim, although to a lesser extent.[2]

B. Additional Facts Pertinent to the Questions Presented.

Bennett's Domino's Pizza Store at 333 Hawaii Avenue, N.E., Washington, D.C. ("Store") was recognized as a

[2] It is important to note that at no time did DPI challenge the instructions of the court to the jury. Since the law governing the case is not at issue, the jury's right to determine the facts must be given even more respect.

successful operation, one of the world leaders in pizza sales. The Store opened in January of 1988.

Arthur and Bruce Bennett are the principals of Bennett, experienced in pizza making and sales, but unsophisticated in running the financial affairs of a business. Consequently, they hired an accountant, reviewed and approved by DPI, whom they relied upon to handle the financial matters of the Store. DPI also instructed Bennett to concentrate on sales and let its accountant handle the financial matters. The Bennetts did not know how to prepare financial statements and believed that their accountant was keeping track of and arranging for payment of the Store's taxes. Unfortunately, the accountant did not handle the tax payments for the first months of the Store's operation.

Although Arthur and Bruce Bennett did not become aware of this tax non-payment situation until the summer of 1988, DPI was aware of Bennett's accountant's failure to pay taxes as early as February 1988. DPI failed to disclose to Bennett that its accountants were not paying taxes, despite its obligation to advise Bennett "of operating problems of the Store disclosed by reports submitted to or inspections made by us." As a result, the tax problem went unabated and Bennett's back tax obligations began to mount.

When Bennett first became aware of the tax issue, it brought the matter to the attention of Patricia Harriday, DPI's Franchise Operations Director, for assistance. DPI's only response was to tell Bennett to work with the accountant to rectify the tax matter. In the fall of 1988, Bennett hired Gordon Clay as its new accountant, who immediately took steps to resolve the tax problem.

In December 1988, DPI placed Bennett in default of the Agreement based on the non-payment of taxes. Bennett continued to work towards resolving the tax matter. By early 1989, Bennett's expenses decreased, and Bennett began to generate an increasing profit. All appro-

priate filings for past and present taxes were completed. Current tax liabilities were being paid, and had been since November 1988. As a result, on February 8, 1989, DPI informed Bennett that its default for non-payment of taxes had been cured and told Bennett that "no further action is required."

In early April 1989, Bennett entered into a payment plan with the District of Columbia for payment of the outstanding taxes, and Clay had already made contacts with the Maryland and IRS taxing authorities to start working out payment plans. As DPI had been informed, payment plans with the IRS and Maryland had not yet been worked out simply because the timing for that had not yet occurred. The "kickoff point" of that effort did not occur until almost the same time Bennett was placed in default for the second time.

On April 28, 1989, DPI informed Bennett that it was again being placed in default of the Agreement for Bennett's previous non-payment of the very same taxes, despite the cure of the previous default. DPI's purported basis for placing Bennett in default was § 15.2 of the Agreement, which states that Bennett was to "operate the Store in full compliance with all applicable laws. . . ." Although the DPI employee who put Bennett in default relied on § 15.2 of the Agreement, and believed at that time that "taxes" were specifically referenced in § 15.2, the Agreement does not mention the non-payment of taxes as either an operational requirement nor a basis for default of a franchisee. No one had ever informed Bennett that a franchisee's non-payment of taxes was a basis for default. Only by specific amendments in *subsequent* versions of its Standard Franchise Agreements did DPI include the non-payment of taxes as a basis for placing a franchisee in default.

Under the default, Bennett was required to pay all of its tax obligations within 30 days or its franchise would be terminated. Bennett did not have the capacity to pay all of its outstanding tax obligations within 30 days.

Rather than be terminated by DPI and left with nothing but outstanding tax obligations and other debts, Bennett had no option but to sell the Store.

A variety of conditions were placed on the sale of the Store by DPI, including requirements that the Store be sold within 30 days to one of DPI's current Washington, D.C. franchisees, Frank Meeks or James Duignan. Bennett requested an extension of time for the sale, but the request was denied.

As a prelude to selling the store, Bennett consulted with DPI regarding the value of the store. DPI's Franchise Operations Director valued the Store at approximately $1.2 million. Bennett estimated the Store's value at approximately $1.5 million. Bennett offered to sell the Store to Meeks for $1.5 million, but Meeks declined.

Next, Bennett met with the only other possible purchaser, Duignan. At the meeting, Duignan estimated the value of the Store at approximately $1 million. After some bargaining between the parties and with time running short, Bennett agreed to sell the Store to Duignan for $900,000. A $900,000 purchase agreement was prepared and forwarded to DPI for its review and approval, as was required by DPI. At trial, Duignan testified that other stores similar to Bennett's which he owned were worth more than $900,000.

After receipt of the Duignan purchase agreement, DPI contacted Bennett and informed it that the Store was to be considered "distressed" and worth only approximately $400,000 (instead of $1.2 million). This devaluation was made even though at the time the Store was viable from a sales standpoint.

After DPI reclassified the Store as unsuccessful, Duignan withdrew his $900,000 offer, claiming he could not obtain financing from his bank. At trial, however, Duignan admitted that he was never told by his bank that financing would be refused, and that at the time of his

negotiations with Bennett he thought his $900,000 offer was a fair price for the Store.

Soon thereafter, Meeks offered Bennett $500,000 for the Store. At the time he made his offer, Meeks knew from someone other than (even though the only entities that should have known these facts were DPI and Bennett) Bennett that the Store was classified as distressed by DPI, that Bennett had to sell the Store by June 1, 1989, and that the offer of $500,000 exceeded DPI's buyout value of $440,000. Prior to making the offer, Meeks had spoken with DPI employee Susan Fulton, Bennett's franchise consultant, whose job was to provide support and assistance to Bennett. Fulton knew Bennett had been put in default for non-payment of taxes and that the Store had to be sold within 30 days. Fulton also told Meeks of the operational problems at the Store, even though it was her stated policy not to involve herself in franchisees' negotiations for the purchases of stores.

Under the Agreement, DPI had a right of first refusal to purchase the Store. To exercise its right of first refusal, DPI needed only to cross out the name of the prospective purchaser on any sales contract, insert DPI in its place, and purchase the Store for the same amount agreed upon. Consequently, the lower the price, the greater the potential benefit to DPI. DPI was not interested in purchasing the Store for $900,000, but was interested in purchasing the Store for $440,000. As of May 31, 1989, DPI was still considering whether it would exercise its right of first refusal with respect to the Store's sale.

With little time remaining until the June 1, 1989 termination deadline and with only a $500,000 offer on the table, Bennett again contacted Duignan regarding his interest in purchasing the Store. Duignan responded by offering $600,000 for the Store. Bennett accepted Duignan's offer and agreed to sell the Store for the $600,000 —one-half of DPI's original estimated value. Paul David Black, DPI's Vice President of Operations, was advised of the low sale price of the Store to Duignan and pro-

vided his approval of this action. Bennett's liabilities at the time of the sale were in the range of approximately $600,000. As a result, Bennett received almost nothing from the sale of the Store.

At trial, Bennett presented the expert testimony of Richard Gaskins regarding the damages sustained by Bennett as a result of DPI's breach of contract. His damages consisted of the present value of the prospective cash flows to Bennett from June 1989 through a sale of the business on December 31, 2008. The December 2008 date was used because the Agreement had a term of ten years and renewal for an additional ten years was a mere formality. Gaskins' analysis relied upon pertinent economic and financial data, including the profitability level of the average DPI store and information generated by Bennett's one and one-half years of operation. His conclusions were conservative, because he used a 12% profit figure in his calculations even though the actual profitability of the Store was 14.35%. Gaskins concluded that Bennett sustained present value damages in the amount of $1.8 million in lost profits as a result of DPI's breach of contract. Gaskin's analysis also accounted for the approximately $600,000 in liabilities owed by Bennett in June 1989. He estimated a repayment of these obligations over seven years and decreased net cash flow to account for the repayment, and therefore no set off for the "benefit" conferred by the $600,000 sales price is necessary. Gaskins also testified that if DPI had assisted Bennett when DPI first became aware of the non-payment of taxes in early 1988, Bennett's tax problems could have been substantially avoided.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' REVERSAL OF THE TRIAL COURT'S DENIAL OF DPI'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON GROUNDS NOT ARTICULATED IN DPI'S FED. R. CIV. P. 50(a)(2) MOTION VIOLATES PETITIONER'S DUE PROCESS RIGHTS, AND DIRECTLY CONFLICTS WITH FED. R. CIV. P. 50 AND A NUMBER OF FEDERAL APPELLATE COURT DECISIONS REGARDING THE APPLICATION OF FED. R. CIV. P. 50(a)(2).

This Petition is about the requirements necessary for preserving and obtaining appellate review, the standards to be actually employed during appellate review of a jury's verdict, and the constitutional impact on a litigant's right to have a jury decide its case when the rules and standards are not followed. Petitioner is not suggesting that circuit courts do not have a right to review a jury's verdict to determine the sufficiency of the evidence supporting that verdict, nor is Petitioner suggesting a defect in the standard of review articulated by the circuit court. Petitioner does challenge, however, the circuit court's reversal of the jury's verdict on grounds not preserved by a proper Rule 50 motion for judgment, and further challenges the circuit court's application of the standard it claimed to be employing.

Even in a civil case in which an appeal is permitted by law as of right from a district court to a Court of Appeals, there are rules and requirements that must be followed in order to preserve and advance such an appeal. For example, an appellant must file a notice of appeal within the prescribed time or suffer dismissal of the appeal, and failure to take other steps set forth in Rules 3 and 4 of the Federal Rules of Appellate Procedure may result in dismissal; indeed, failure of an appellant to meet any jurisdictional requirements of Federal Rules of Appellate Procedure 3 and 4 may not be waived. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). There are many deadlines and requirements relating to

logistical matters, violation of any of which can result in dismissal or failure to move an appeal forward.

More important to the administration of justice are the substantive matters and issues, *i.e.*, the subject matter of an appeal. Those issues must be preserved—that is not discretionary—and to allow an appeal in absence of adherence to Rule 50 is to infiltrate the entire appellate process with an overcast of arbitrariness. Arbitrary consideration of appeals not properly preserved is a violation of due process, and both endangers public faith in the judicial system and creates a burden on the courts. This is partcularly so when a jury verdict is reversed on the basis of insufficiency of the evidence. The ultimate winning party is deprived of the opportunity to correct purported deficiencies prior to submission of its case to the jury, something that cannot be done at the appellate stage.

This Court has recently reaffirmed the strong emphasis and importance of the procedural component of the due process clause, *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), *on remand*, 888 P.2d (Ore. 1995), *petition for cert. filed* (May 17, 1995), noting that the analysis in that case "should focus on [the] departure from traditional procedures." *Id.* at 2335. The Court stated that "when the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.* at 2340. No less can be said about a situation where procedures are in place, but are ignored, for the "whole purpose" of the due process clause is to prevent arbitrary deprivations of liberty or property. Thus, just as a decision to punish a tortfeasor by means of exemplary damages is an exercise of state power that must comply with the due process clause, so must any actions made to reverse a judgment obtained by a litigant pursuant to a jury's verdict. As Justice Scalia wrote in his concurring opinion,

> The deprivation of property, without observing (or providing a reasonable substitute for) an important

> traditional procedure for enforcing state prescribed limits upon such deprivation violates the due process clause. *Id.* at 2342-2343.

If a losing party is entitled to a process which allows for the review of the damages awarded against it, it is equally, if not more so, fundamentally fair and imperative that a winning party be afforded the protections of procedures in place so as to preserve the judgment awarded it by a jury.

Certiorari should be granted in this case to articulate the requirement that the Federal Rules of Civil Procedure must be uniformly applied and strictly adhered to, and to remedy the United States Court of Appeals for the District of Columbia Circuit's ruling which is contrary to Fed. R. Civ. P. 50 and the federal appellate court decisions concerning the application of Fed. R. Civ. P. 50.

Fed. R. Civ. P. 50 precludes an appeal of a trial court's denial of a motion for judgment as a matter of law on grounds not articulated in the Fed. R. Civ. P. 50(a)(2) motion. Fed. R. Civ. P. 50(a)(2) states that:

> Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion must specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

The Advisory Committee's notes on the 1991 amendments reinforce a strict application of paragraph (a)(2).

> The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof.

Fed. R. Civ. P. 50 Advisory Committee's note. The Advisory Committee's notes are given great weight in

assessing the meaning of the rules. *See Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438, 444 (1946).

Other federal appellate courts interpret Fed. R. Civ. P. 50 to preclude the appeal of a trial court's denial of a motion for judgment as a matter of law on grounds not articulated in the motion for judgment as a matter of law made at the close of all evidence. *See Keisling v. Ser-Jobs For Progress, Inc.,* 19 F.3d 755, 758-59 (1st Cir. 1994) (motion for judgment as a matter of law made at the close of plaintiff's case was insufficient to preserve issue that defendant is now seeking to present on appeal); *Piesco v. Koch,* 12 F.3d 332, 341 (2d Cir. 1993) ("We cannot conclude that defendants' motion for judgment as a matter of law prior to verdict was sufficiently informative to preserve their right to move for judgment as a matter of law after trial."); *Lambert v. Genesee Hosp.,* 10 F.3d 46, 53-54 (2d Cir. 1993) (since defendants failed to raise issues at directed verdict stage or articulate grounds upon which they deserved judgment as a matter of law, issues cannot be raised in a subsequent motion), *cert. denied,* 114 S. Ct. 1612 (1994); *Libbey-Owens-Ford Co. v. Insurance Co. of N. Am.,* 9 F.3d 422, 426-27 (6th Cir. 1993) (plaintiffs' failure to move for a directed verdict expressly or in a manner to alert the trial court precluded consideration of the motion for judgment as a matter of law); *Allied Bank-West, N.A. v. Stein,* 996 F.2d 111, 115 (5th Cir. 1993).

The raising of additional law, facts, or arguments in a Fed. R. Civ. P. 50(b) motion does not preserve the right to appeal the denial of a Fed. R. Civ. P. 50(b) motion based upon these additional grounds, since a Fed. R. Civ. P. 50(b) motion is merely a renewal of the motion for judgment as a matter of law at the close of all evidence and cannot assert grounds not included in the earlier motion. *See* 9A *Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure* § 2537 (1995); 5A *James W. Moore, et al., Moore's Federal Practice,* ¶ 50.08 (2nd ed. 1995).

Here, DPI moved for judgment on certain limited grounds at the close of Bennett's primary case, and failed to specify any grounds, law or facts in a motion for judgment at the close of all evidence. After trial, DPI renewed its motion for judgment under Fed. R. Civ. P. 50(b) on some of the grounds raised at the close of Bennett's primary case, and also, *inter alia*, on the basis that DPI provided Bennett with reasonable assistance as required by § 11 of the franchise agreement and that DPI did not have the requisite motive or intent to be liable for tortious interference with prospective economic opportunity. Following the trial court's denial of this motion, DPI further expanded its grounds in its appeal to the circuit court.

In reversing the trial court's denial of DPI's motion for judgment and the jury's verdict, the circuit court based its decision upon arguments DPI first raised in its post-trial proceedings. The circuit court reversed the trial court's denial of DPI's motion for judgment on the basis that DPI provided more than the reasonable assistance required under § 11 of the franchise agreement even though DPI never sought judgment at the close of all evidence on that issue. Moreover, the circuit court reversed the trial court's denial of Bennett's tortious interference with prospective economic opportunity claim asserting that Bennett failed to show that DPI "harbored any ill motive or intent to disrupt Bennett's economic advantage," (App. 11a); again, DPI never sought judgment as a matter of law at the close of all evidence on Bennett's tortious interference claim based upon a lack of ill will or motive on the part of DPI.

There are compelling reasons for the requirement that the moving party articulate at trial the basis on which the judgment as a matter of law could be rendered. The process assures that the trial court has an adequate basis for its decision. 5A *James W. Moore, et al., Moore's Federal Practice*, ¶ 50.04 (2nd ed. 1995). The rule also protects litigants' Seventh Amendment rights. *See Libbey-Owens-Ford Co.*, 9 F.3d at 426. Moreover, the rule "discourages courts from re-weighing the evidence simply

because they feel the jury could have reached another result." *Id.* In addition, the rule prevents tactical victories whereby one party gains an upper hand by not articulating a basis for its motion so that the adverse party will not have the opportunity to correct any defects in the proof it has presented. *Id.; Lambert*, 10 F.3d at 54; Fed. R. Civ. P. 50 Advisory Committee's note; *Moore's Federal Practice*, ¶ 50.04. These policies are fostered by precluding a party in a Fed. R. Civ. P. 50(b) motion or in an appeal from asserting other grounds than those already raised in its Fed. R. Civ. P. 50(a)(2) motion.

If litigants and courts ignore the requirements of Fed. R. Civ. P. 50(a)(2), as was the case here, one can expect the appellate docket to increase significantly. Losing parties will have an incentive to raise additional issues for appeal other than those articulated in their Fed. R. Civ. P. 50(a)(2) motions for judgment, especially since those prior arguments were unsuccessful.

The circuit court's opinion evidences an acquiescence to litigants' attempts to avoid the requirements of the Federal Rules of Civil Procedure and is in conflict with Fed. R. Civ. P. 50(a)(2). The Court should grant certiorari to ensure a fair and uniform enforcement of Fed. R. Civ. P. 50(a)(2) and eliminate appeals based upon grounds not articulated in Fed. R. Civ. P. 50(a)(2) motions.

II. THE CIRCUIT COURT'S DECISION DEMONSTRATES BLATANT DISREGARD FOR THE STANDARD OF REVIEW ANNOUNCED BY THE SUPREME COURT FOR CHALLENGING THE SUFFICIENCY OF A JURY VERDICT, THEREBY VIOLATING PETITIONER'S DUE PROCESS RIGHTS AND CONSTRUCTIVELY DENYING ITS CONSTITUTIONAL RIGHTS GUARANTEED BY THE SEVENTH AMENDMENT.

This Court has recently affirmed the due process rights of citizens with respect to the selection of juries. "Whether the trial is criminal or civil, potential jurors,

as well as litigant's, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J. E. B. v. Alabama Ex Rel. T. B.*, 114 S. Ct. 1419, 1421 (1994). "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in a judicial process. The litigants are harmed by the risk that the prejudice which motivated the discriminatory selection of the jury will infect the entire proceedings. . . . The community is harmed by the state's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state sanctioned discrimination in the court room engenders." *Id.* at 1427.

There can be no argument that a litigant's right to a jury trial is a constitutionally protected fundamental right, and courts can no more interfere with the constitutionally protected rights of citizens than any other branch of government. As it is a violation of due process to discriminate in the selection of jurors, and as citizens have a right not to be discriminated against so as to deprive them of the right to sit on a jury, then surely the purpose and function of their service as a juror—the litigant's right to have the jury decide the case—can be no less protected.

As stated by Justice Kennedy in his concurring opinion in *J.E.B.*, "the equal protection clause and our constitutional tradition are based on the theory that an individual possesses rights that are protected against lawless action by the government." *Id.* at 1433-34. Courts are no less subject to this maxim. Just as juries must follow a court's instructions on the law, so must the courts follow the rules, or suffer an erosion of public trust in the judicial system. If the democratic ideals of trial by jury are to be preserved, the decisions of a jury must be given the utmost respect.

Bennett seeks certiorari so this Court can reiterate the proper standard of review for appeals based on claims of

insufficiency of the evidence, and, in the process, restore Bennett's Seventh Amendment rights. To protect Seventh Amendment guarantees, this Court has previously set strict parameters for federal appellate courts in reviewing claims that a jury verdict is based on insufficient evidence. Bennett's rights were violated because the circuit court egregiously ignored prior Supreme Court precedent regarding the standard of review to be applied in assessing a jury verdict. This court must now speak again to ensure that federal courts do not take away a litigant's right to have a jury decide its case due to a reviewing court's failure to follow the law.

A. The Origin of the Seventh Amendment.

The right to a jury trial and the importance of jury findings has long been recognized as critical to preserving individual liberties. Thomas Jefferson stated that "trial by jury [was] the only anchor, ever yet imagined by man, by which a government can be held to the principles of [its] constitution." 15 *The Papers of Thomas Jefferson* 267 (Julian P. Boyd ed., 1958). Such sentiment was recently reflected by Chief Justice Rehnquist in dissent in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-44 (1979):

> The founders of our nation consider the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added to that of the judiciary . . . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

The Seventh Amendment of the United States Constitution states in pertinent part that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." This guarantee of the Seventh Amendment was important to the anti-federalists who were concerned that Article III, § 2 of the Constitution which granted the Supreme Court "appellate Jurisdiction, both as to Law and Fact" would result in unrestricted appellate court

factfinding that would compromise individual liberty by combining judge and jury functions and that Supreme Court reversals of state court fact finding would threaten state autonomy. *See* Marc E. Sorini, Note; *Factual Malice: Rediscovering The Seventh Amendment in Public Person Liable Cases*, 82 Geo. L. J. 563, 579 (1993). One anti-federalist believed that the Supreme Court's jurisdiction over fact provided the federal government "an opportunity, if it disapproved the verdict of the jury, to appeal, and to have facts examined into again and decided upon by its own judges, on whom it was thought a reliance might be had by the general government, they being appointed under its authority." 2 *The Complete Anti-Federalist*, 320 (Herbert J. Storing ed., 1981). Recognizing such concerns, the Supreme Court interpreted the Seventh Amendment as a means of protecting jury trials and the jury's findings of fact.

> The aim of the Seventh Amendment . . . is to preserve the substance of the common-law right of trial by jury, as distinguished from the mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court, misuse of facts are to be determined by the jury under appropriate instructions by the court.

Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

B. Importance of the Seventh Amendment.

The Seventh Amendment guarantees the important freedoms of a right to a jury trial and deference to the jury's findings. Without deference to a jury's factual findings, the right to a jury trial would be compromised. There are compelling reasons supporting deference by appellate courts to a jury's factual findings. First, it protects parties from "compliant, biased, or eccentric judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), *reh'g denied*, 392 U.S. 947. Second, deference to jury's factual

findings reduces court congestion. *See* Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Pugent Sound L. Rev. 11 (1994) ("*Standard of Review*"). The more deference given to the jury, the less incentive the losing party has to appeal the jury's decision, because parties will have the satisfaction of knowing that factual issues were resolved. If fewer losing parties appeal, there will be less appellate cases resulting in an easing of the appellate docket. Third, a jury should be given deference, because it is in a better position to make findings of fact. *See United States v. Bailey*, 444 U.S. 394, 412 n.9 (1980). The jury can observe firsthand the demeanor of each witness and access witness credibility. Fourth, deference to the jury's factual findings is necessary, as a high portion of reversals erodes the public confidence in jury trials. *See supra, Standard of Review* at 19-20. The Supreme Court recognized the importance of jury trials and pronounced that any scrutiny of a jury's findings should be done with utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

C. Supreme Court Parameters for Review of Jury Factual Findings.

To protect the sanctity of jury trials, the Supreme Court declared the limited review in which a court of appeals can engage in reviewing a jury's factual findings.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). It is essential for any federal appellate court in reviewing a jury verdict to abide by these guidelines. Otherwise, the province of the jury is invaded resulting in a violation of the Seventh Amendment.

1. *Credibility of Witnesses.*

For at least a century, the Supreme Court has insisted that jurors alone are to evaluate the demeanor and credibility of witnesses.

> [T]here are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him to the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case such as the one at bar, belongs to the jury, or presumed to be fitted for it by their natural intelligence and the practical knowledge of men in the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it except in the case of manifest and extreme abuse of their function.

Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1981).

On appeal, a jury's assessment of credibility cannot be reconsidered. *Ellis v. Union P. R. Co.*, 329 U.S. 649, 653 (1947); *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946). Thus, when two or more witnesses have conflicting testimony regarding a question of fact on which they have personal knowledge and there is no other evidence dispositive of the issue, a jury's decision to believe one witness over another is conclusive. *See* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 265 (1989) ("*Judges Against Juries*"). A court of appeal's decision to credit a witness the jury disbelieved would be in direct conflict with Supreme Court precedent on the Seventh Amendment.

2. *Drawing Inferences.*

The Supreme Court mandated that inference drawing is reserved for the jury. *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 35 (1944) ("it is a jury, not the court, which . . . weighs the contradictory evidence and inferences . . . and draws the ultimate conclusions as to the facts. The very essence of its foundation is to select from

among conflicting inferences and conclusions that which it considers most reasonable"), *reh'g denied*, 321 U.S. 802; *Standard Oil Co. v. Brown*, 218 U.S. 78, 86 (1910) ("what the facts were . . . and what conclusions were to be drawn from them were for the jury and cannot be reviewed here."). Once an inference is decided upon by the jury, that inference cannot generally be reviewed by an appellate court.

3. *Weighing Evidence.*

The Supreme Court has also instructed appellate judges to not assess the weight of the evidence before the jury. *Gunning v. Cooley*, 281 U.S. 90, 94 (1930) ("issues that depend upon the . . . weight of evidence are to be decided by the jury"); *Baltimore & O. R. Co. v. Groeger*, 266 U.S. 521, 524 (1925) ("the weight and probative value of evidence are to be determined by the jury, and not by the judge"); *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 91 (1981) ("[w]e have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted"); *Lancaster v. Collins*, 115 U.S. 222, 225 (1885) ("the court cannot review the weight of the evidence . . .").

D. Violation of Bennett's Seventh Amendment Rights.

The United States Court of Appeals for the District of Columbia Circuit's reversal of the jury verdict for Bennett was a violation of Bennett's Seventh Amendment rights and exemplifies a complete disregard of Supreme Court precedent regarding judicial review of jury verdicts. It is not sufficient for a court merely to write that it is following the standards for reviewing a jury's verdict; it must actually follow them. A review of some of the circuit court's factual conclusions, contrasted with the evidence presented by Bennett, the non-movant, demonstrates that the circuit court inappropriately weighed evidence, assessed credibility, and drew inferences in favor of DPI; and that it did so in such an egregious manner as to require this court's supervision.

1. *Breach of Contract.*

The circuit court did not follow the law from the outset. After concluding that the contract provision in question was not ambiguous,[3] the circuit court ignored a plethora of evidence introduced by Bennett and made the insupportable assertion that the evidence was "undisputed" that Bennett was not in compliance with the tax laws, and the incorrect assertion that "there was no countervailing evidence on which the jury could base its conclusion that Domino's breached the contract by exercising its right to place Bennett in default for failure to adhere to the applicable tax laws." (App. 8a).

The circuit court failed to examine the breach of contract claim in its proper context; *i.e.*, what does the term "in compliance with all applicable laws" mean within the four corners of the written agreement. It is a fundamental precept that having asserted that Bennett was not in compliance with applicable laws Domino's had the burden of proving this by way of *evidence introduced at trial.*

Domino's introduced *no evidence* relating to tax laws: it made not even a passing reference to the Internal Revenue Code; it identified no specific provision of the Internal Revenue Code or any other law; it presented no witnesses from any taxing authority; it failed to ask the district court to take judicial notice of any tax law; and it failed to ask the district court to instruct the jury in any way about tax laws. Domino's never defined the term "in compliance", and presented no evidence sug-

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[3] It is notable that Domino's did not object to the Court's instruction to the jury relating to the introduction as evidence the subsequent (to Bennett's) forms of Domino's' standard franchise agreement, did not mention this evidence in its motion for judgment at the close of Bennett's evidence, and only raised this issue in its motion for a new trial, for which the standard of review is abuse of discretion. Since the Bennett's case went to the jury with this evidence, at the every least Bennett is entitled to have the case remanded, on both counts, since the panel linked them together.

gesting that having a back balance due was not "in compliance" with any tax laws. Even if it is introduced merely by judicial notice of a fact, jury verdicts and court decisions must be founded on evidence produced at trial.[4] The circuit court's decision, no matter how "obvious" the tax law compliance question may seem to the circuit court, is not supported by evidence introduced at trial. The jury's verdict is.

Bennett proved that at the time of the default it had filed all appropriate returns for the back taxes, it had been timely paying its currently owed taxes for several months, had worked out a payment plan and made the first payment to the District of Columbia, and was working toward payment plans with the IRS and Maryland. The combination of Domino's lack of evidence and Bennett's presentation of evidence refutes any contention that it was "undisputed" that Bennett was not in compliance with whatever it was assumed it should have been.

The circuit court's most glaring failure to adhere to the appropriate standard of review is its complete ignoring of Bennett's evidence that the tax default was cured, particularly the February 8, 1989 letter from Domino's headquarters to Bennett. (App. 40a). This letter is critical in two respects. First, it demonstrates that the steps taken by Bennett subsequent to the December 1988 default were acceptable to Domino's, and was evidence for the jury to conclude that, in the eyes of *Domino's,* Bennett was now in *compliance* with whatever Domino's believed necessary.

Second, the letter and attendant testimony of both parties is evidence supporting the jury's determination

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[4] "As an appellate court, our adjudicatory authority extends only to questions amply grounded in the record." *United States v. Pinkney,* 543 F.2d 908, 915 (D.C. Cir. 1976). *See also Carr v. District of Columbia,* 543 F.2d 917, 921 (D.C. Cir. 1976) ("Numerous documents which are vital links in appellant's lack of title argument are completely outside the record before us, and 'the evidentiary virtues appellant[s] attribute[] to them cannot be left to mere assumption.' ")

that Domino's' April 1989 default was a breach of its contractual obligations. The circuit court apparently relied on an incorrect assertion in Domino's brief that Pat Harriday told Bennett that Domino's' "would" put Bennett back in default if the back taxes weren't satisfied within six to ten weeks of the cure, thus suggesting that the second default was a mere continuation of the first. This was not argued by Domino's at trial, and is wrong for three reasons.

First, it is not supported by the evidence. Pat Harriday, who was not the decision maker, testified (without saying why or on what basis) only that Domino's "could" put Bennett in default. (App. 30a-31a). The April 1989 default letter (App. 41a), mentions nothing about the December default, the cure, or any six to ten week deadline. Furthermore, the decision maker for the April default, Stuart Mathis, never testified that he even knew of the first default, the cure, or that he was merely following up on a six to ten week deadline. He had arrived as the new regional director only a few weeks prior to putting Bennett in default, and gave his own explanation for doing so. Indeed, Mr. Mathis never testified that it was "wrong" for Bennett not to have paid taxes early on, but only that he believed Bennett could not overcome financial problems due to the accumulated tax debt.

Second, the written cure letter made no such assertion. Its only provision was that Domino's did not waive its right to put Bennett in default for *additional or future* violations, and Bennett proved through the testimony of Domino's personnel that no additional violations occurred after February 8. Thus the jury had a basis to conclude that Domino's was estopped from putting Bennett in default for something already cured.

Third, Domino's originally put Bennett in default for the non-payment of taxes in December of 1988. (App. 38a). Domino's later advised Bennett that it would be satisfied for purposes of that default if Bennett produced evidence that it was working towards obtaining

payment plans with the various tax authorities. Relying on letters from the District of Columbia and Internal Revenue Service (App. 43a, 44a) and with full knowledge that Bennett had not yet paid off its back taxes, Domino's, by the February 8 letter, declared the default based on non-payment of taxes cured. At trial Bennett produced evidence that its financial condition had continued to improve between the date of the cure letter and the second default in April of 1989, that it had achieved the payment plan with the District of Columbia and was continuing to work towards payment plans with Maryland and the Internal Revenue Service. Thus the circuit court's assumption of a continuation of one default to the other cannot supplant the jury's conclusion based on the evidence.

The circuit court also violated the standards of review in ignoring proof of Bennett's claim that it was not provided the required assistance. The circuit court acknowledged that Domino's was "contractually obligated" to provide Bennett reasonable operating assistance. Yet grasping at a few points, that are either irrelevant or contradicted by other evidence, the circuit court concluded that it was "undisputed" that "no reasonable factfinder could draw from this evidence the inference that Domino's failed to offer Bennett" reasonable operating assistance.

The circuit court again ignored Bennett's evidence, and impermissibly outweighed the purported "assistance" Domino's says it gave *after* the tax liability grew to the financial problem Domino's used to put Bennett in default,[5] over the evidence of fact—not just inference—Bennett presented, proving that Domino's failed for months to give notice to Bennett: notice of the very problem Domino's used as the basis for the default. (App. 29a).

Bennett's claim is that Domino's' failure to provide assistance *before* its back tax liability grew in size and caused the default. Bennett proved that Domino's knew

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[5] Notably, none of the "assistance" cited had anything to do with the tax situation, the subject of the default and Bennett's claim.

in the second month of Bennett's operation that Bennett's accountants weren't paying taxes, that Domino's never advised Bennett of this fact, and that Bennett's principals did not become aware of this until several months later. Bennett further proved that once it became aware of the tax situation it took prompt steps to rectify it and that as it was moving towards resolution of the tax problem its financial condition was improving. Bennett's expert witness testified that Domino's' delay in advising Bennett of the growing tax liability caused the accumulation of the tax debt that was the basis of the default. DPI's own expert witness acknowledge that early notice would have prevented the tax problem from developing into the very financial problem Domino's used as a basis for the default.

The circuit court ignored this evidence, and instead, adopted DPI's characterization of the evidence that DPI could not verify whether Bennett was paying taxes, since it did not have profit and loss statements (App. 9a), which, of course, ignores the factual information that DPI *did* have. (See App. 35a).

The circuit court further attempts to legitimize DPI's failure to advise Bennett of the tax situation by claiming that during the critical time period "Bennett either knew or should have known that it was not paying its taxes at this time since Bruce Bennett was responsible for writing the checks to pay all bills until he turned over this responsibility to his accountant at the end of 1988." (App. 9a). For the circuit court to conclude that Bennett knew or should have known of the nonpayment of taxes, it must have assessed Bruce Bennett's credibility or simply disregarded evidence. Bruce Bennett specifically testified that he did not become aware of the tax problem until mid-1988 when he received delinquency notices from the taxing authorities. In addition, he testified that he could not have been aware of the problem earlier as he was unaware of how and when business taxes should be paid and had entrusted the accountants to handle this matter. (App. 28a-29a).

On this evidence, the jury was completely justified in concluding, as it did, that Domino's' failure to provide early notice to Bennett *before* the tax situation resulted in the default was a breach of Domino's contractual obligations, and that the purported assistance Domino's claims to have given after the default was really no assistance at all.

2. *Tortious Interference.*

Misreading the evidence it did cite and again ignoring all of Bennett's evidence and the inferences the jury was free to draw therefrom, the circuit court reversed the jury's verdict and the trial court's denial of DPI's motions for judgment as a matter of law on the basis that Bennett's evidence did not meet a "strong showing of intent" standard,[6] and that there was no evidence of ill motive or intent by Domino's.[7]

The evidence introduced at trial is directly opposite to, and/or refutes, the assertions of the circuit court, and thus the circuit court's impermissible weighing of the evidence against Bennett can properly be described as an extraordinary departure from proper standards.

For example, the circuit court improperly resolved a factual dispute in favor of DPI when it concluded only that "Meeks stated that Bennett's Store had operational problems and Fulton acknowledged that these problems did exist." Bennett presented evidence that Ms. Fulton specifically told Mr. Meeks about Bennett's operational problems. Imposing its own determination on conflicting evidence, the circuit court also concluded that Mr. Meeks didn't need information from DPI, because he possessed this financial information from Bennett. Yet there was no evidence on the record that the operational problems of which Ms. Fulton advised Mr. Meeks were reflected

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[6] This standard itself indicates that the evidence is to be weighed, *by the jury*.

[7] Bennett proved that Domino's, who had first right of refusal on any contract of sale for the store, was interested in buying the store for itself at $440,000, but not $900,000.

in the financial information Bennett supplied to Mr. Meeks. The circuit court also ignored evidence that Mr. Meeks was aware, from sources other than Bennett, that Bennett had to sell the Store in a very short time period, and he knew that his offer of $500,000 exceeded DPI's distressed valuation of the Store. Bennett presented sufficient evidence that Mr. Meeks' low offer was a result of DPI's transfer of detrimental information about Bennett to Mr. Meeks. (App. 33a-34a).

The circuit court further stated that Bennett "established at most that Domino's, through the legitimate disclosure of truthful information in the ordinary course of business, contributed to Bennett's failure to sell its troubled enterprise for as high a price as it wished". There can be no clearer example of a jury's function than to determine qualitatively whether or not information or actions are truthful or not, transmitted in the ordinary course of business or covertly, and whether or not they were an intentional interference. The circuit court's failure to read the evidence it did cite correctly, and/or its proclivity to improperly weigh it in favor of Domino's, serves to magnify the degree to which the circuit court interfered with the function of the jury.

The circuit court also concluded that "Bennett offered no evidence of any communications between Domino's and Duignan," since Mr. Duignan's withdrawal of his offer was because he made an initial offer of $900,000 based upon a representation that sales were $1.8 million and "he made a $600,000 second offer based on the correct sales figure of approximately $1.3 million." Yet this factual conclusion conflicts with DPI's own expert witness' testimony and disregards testimony that Mr. Duignan believed $900,000 was a fair price for the store and that similar stores were worth more than $900,000. The jury had more than sufficient evidence to conclude that DPI advised Mr. Duignan of the store's valuation and classification, and that this revelation led Mr. Duignan to withdraw his $900,000 offer. (App. 32a, 35a).

Finally, the circuit court concluded that there was no evidence of any ill motive or intent by DPI to disrupt Bennett's economic advantage. Again, this conclusion disregards evidence supporting Bennett's claim. It was improper for DPI to reclassify the store as distressed and worth only approximately $440,000 when DPI initially valued Bennett's Store at $1.2 million, the store was viable from a sales standpoint, and was achieving record sales levels. DPI's ill motive in advising Mr. Meeks and Mr. Duignan that the store was distressed and worth only $440,000 was revealed through evidence that DPI possessed a right of first refusal for any sale of the store and was considering purchasing the store for approximately $400,000. (App. 32a-33a).

The circuit court's opinion reflects on its face that it assessed credibility, weighed the evidence, resolved inferences in favor of DPI, and ignored facts. Such actions are contrary to Supreme Court precedent regarding the review of jury verdicts set forth to protect Seventh Amendment rights. As public confidence in the judicial system is significantly low, it appears that the federal appellate courts' confidence in the jury system is also significantly low. Now is the time for this Court to once again declare the importance of the jury in our legal system and rebuke federal appelalte courts that unilaterally dispensed with the Seventh Amendment. Citizens must be assured that those rights which are guaranteed them by our Constitution will be vigilantly protected and preserved.

CONCLUSION

For the above reasons, a Writ of Certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

MICHAEL J. MCMANUS
Counsel of Record
VERNON W. JOHNSON, III
JONATHAN R. CLARK
JACKSON & CAMPBELL, P.C.
1120 Twentieth Street, N.W.
South Tower
Washington, D.C. 20036
Counsel for Petitioners
Bennett Enterprises, Inc.